

>>> "John Hammond" <jhammond@berriencounty.org> 09/16/04 01:18PM >>>

To: Clerk, Michigan Supreme Court
From: John T. Hammond, Circuit Judge
Re: ADM File No. 2003-62

MSC_clerk@courts.mi.gov

The famous maxim of Roberts P. Hudson, found on the wall of the former Board Room of the State Bar reads: "No organization of lawyers can long survive which has not for its primary object the protection of the public." I suggest that the proposed new Michigan Rules of Professional Conduct may not be an improvement in at least one area. I refer to proposed Rule 1.6.

The proposed rule, (emphasis added), reads, in part, as follows

"Rule 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information RELATING TO THE REPRESENTATION OF A CLIENT unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal INFORMATION RELATING TO THE REPRESENTATION OF A CLIENT..."

The former rule, (emphasis added), reads, in part, as follows

MRPC Rule 1.6 Confidentiality of Information.

(a) "Confidence" refers to information protected by the client-lawyer privilege under applicable law, and "secret" refers to other INFORMATION GAINED IN THE PROFESSIONAL RELATIONSHIP THAT THE CLIENT HAS REQUESTED BE HELD INVIOLEATE OR THE DISCLOSURE OF WHICH WOULD BE EMBARRASSING OR WOULD BE LIKELY TO BE DETRIMENTAL TO THE CLIENT.

(b) Except when permitted under paragraph (c), a lawyer shall not knowingly...

I suggest that "...relating to the representation of a client..." is far narrower and that this difference could ignore the reasonable expectations of the client, and result in material harm to the client.

For example, a client may pour out the most sensitive aspects of the client's personal history to the lawyer. Sometimes this is in response to the pretrial question from the client's lawyer "Is there anything else I ought to know before putting you on the stand, any topic I should avoid, any area where I should be quick to object to any questions from opposing counsel?"

The information from the client may not be at all relevant to the case at hand, but the revelation may be destructive if, for example, a history of a sexually transmitted disease, an illegitimate child, an abortion, an adulterous affair, or something even worse were to be retold over drinks at the 19th hole the next week. Remember the movie "ABSENCE OF MALICE"! The movie setting was in Florida, but the real events were all in Detroit, and many lawyers from that corner of the state were able to recognize and identify the real participants.

To fix the problem, I suggest the following replacement:

"Rule 1.6 CONFIDENTIALITY OF INFORMATION

- a. A lawyer shall not reveal information relating to, OR ACQUIRED IN THE COURSE OF, the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b)
- b. A lawyer may reveal information relating to OR ACQUIRED IN THE COURSE OF, the representation of a client..."

Though some suggest that comment no. 16 covers the matter, it does not. That comment covers the means used to communicate, e.g. Use (or non-use) of a voice scrambler in discussing the client's matters with a fellow partner in the firm, etc. More to the point would be adding a comment along the lines of:

(17) "PARTICULAR CARE MUST BE EXERCISED WITH REGARD TO INFORMATION GAINED IN THE PROFESSIONAL RELATIONSHIP THAT THE CLIENT HAS REQUESTED BE HELD INVIOLEATE OR THE DISCLOSURE OF WHICH WOULD BE EMBARRASSING OR WOULD BE LIKELY TO BE DETRIMENTAL TO THE CLIENT."

P.S. I have used all-caps because underlining, bold-face and italics are not transmitted by ordinary e-mail, and this has created big problems on occasion. JTH